

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Rafael A. HERNANDEZ 584-86-6787-D1

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2431

Rafael A. HERNANDEZ

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.30-1 (currently 46 CFR Part 5, Subpart J).

By order dated 28 February 1985, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's document for one month outright plus an additional two months' suspension on ten months' probation upon finding proved the charges of misconduct and inattention to duty. The misconduct charge was supported by two specifications. The specifications found proved allege that Appellant, while serving as person in charge aboard T/B NMS 1906, under authority of the captioned documents, on or about 1655, 27 January 1985, (1) did fail to insure that the cargo tank butterworth covers were securely shut prior to argo transfer resulting in an oil spill into the Calcasieu River (33 CFR 156.120(e)), and (2) did transfer oil from said barge without the required oil transfer procedures. The inattention to duty specification found proved alleges that Appellant, while serving as aforesaid, did fail to insure both of the required fire extinguishers were in serviceable condition prior to cargo oil transfer.

The hearing was held at Port Arthur, Texas, on 19 February 1985. At the hearing, Appellant appeared without professional counsel and entered a plea of not guilty to the charges and supporting specifications.

The Investigating Officer introduced in evidence six exhibits and the testimony of two witnesses. In defense, Appellant introduced in evidence two exhibits.

The Administrative Law Judge rendered a written Decision and

Order on 28 February 1985. He concluded that the charge and specifications of misconduct and the charge and specification of inattention to duty had been proved and suspended Appellant's document for one month outright plus an additional two months' suspension on ten months' probation.

The complete Decision and Order was served on 5 March 1985. Appeal was timely filed on 22 February 1985.

FINDINGS OF FACT

At all relevant times on 27 January 1985, Appellant was serving as the person in charge of oil transfer operations under the authority of his document aboard the T/B NMS 1906, a 200-foot steel tank barge owned and operated by the National Marine Service, Inc. Appellant is the holder of a U. S. Coast Guard Merchant Mariner's Document endorsed for tankerman, ordinary seaman, wiper and steward's department. As the person in charge on 27 January, Appellant was supervising a cargo transfer operation aboard the tank barge while the vessel was moored at the Citgo Corporation dock in Lake Charles, Louisiana. While Appellant was loading the tank barge, he allowed the vessel to get out of trim. With the barge down by the stern, oil pressed up against and spilled through the two loose butterworth plates at the No.3 port cargo tank. The bolts on the two butterworth plates were only hand tightened. The resulting spill into the Calcasieu River was estimated to be 84 gallons of cargo oil.

Oil transfer procedures were neither posted nor available for inspection. Appellant provided only a simple line diagram of the oil transfer system.

The Certificate of Inspection for the NMS 1906 requires the tank barge to have two B-II fire extinguishers available during cargo transfer operations. The gauges on the two available fire extinguishers aboard the tank barge indicated the extinguishers required recharging, and one extinguisher was missing the seal holding in the pin.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant asserts the following grounds for appeal:

1. Appellant should not be held totally liable for the loose butterworth covers since the negligence of a shipyard was a major contributor to the oil spill.

2. Oil transfer procedures were onboard the tank barge, and the fire extinguishers were in good condition.

3. The penalty assessed by the Administrative Law Judge is too severe and without proper consideration of the mitigating circumstances.

APPEARANCE: National Marine Service, Inc., 3815 Dacoma St., P.O.Box 94189, Houston TX 77292.

OPINION

I

Appellant states that when the butterworth covers on the NMS 1906 were removed and reinstalled at the Fredeman Shipyard on 25 January 1985, the reinstalled covers were only bolted down finger tight. Consequently, Appellant alleges he should not be held totally liable for the loose butterworth covers since the shipyard was a major contributor to the oil spill.

In these administrative proceedings, the alleged fault of others does not absolve Appellant so long as the actions of Appellant are proved to be misconduct. Appeal Decision 2391 (STUMES). "Appellant will not be allowed to escape responsibility for his misconduct by claiming someone else could have prevented it." Appeal Decision 2317 (KONTOS).

By signing the Declaration of Inspection, Appellant certified he examined the vessel and determined it met the requirements of 33 CFR 156.120. See 33 CFR 156.150(a)(b). Yet during the oil transfer operations, the butterworth covers were obviously loose and the bolts securing the covers were only hand tight. The substantial evidence in the record shows Appellant himself, as the person in charge, failed to secure the butterworth covers prior to commencing the cargo transfer operations as he was required to do by regulation. See 33 CFR 156.120(e).

II

Appellant states that the required oil transfer procedures were

onboard the tank barge, and that the fire extinguishers were in good condition. In essence, Appellant argues that the Administrative Law Judge's decision on these issues is against the weight of the evidence.

It is the duty of Administrative Law Judge to evaluate the evidence presented at the hearing:

The question of what weight is to be accorded to the evidence is for the judge to determine and, unless it can be shown that the evidence upon which he relied was inherently incredible, his findings will not be set aside on appeal. *O'Kon v. Roland*, 247 F.Supp. 743 (S.D.N.Y. 1965).

Appeal Decision 2116 (BAGGETT), cited with approval in Appeal Decision 2333 (AYALA). See also Appeal Decisions 2422 (GIBBONS) and 2302 (FRAPPIER).

The contents of the oil transfer procedures provided by Appellant included only a simple line diagram of the vessel's oil transfer system. The Administrative Law Judge correctly found that Appellant did not have in his possession a copy of vessel oil transfer procedures that satisfied regulatory requirements. See 33 CFR 156.120(t)(2); see also 33 CFR 155.750. Additionally, evidence in the record demonstrates that the two B-II fire extinguishers needed to be recharged and that one had a broken seal. Appellant clearly failed to ensure that two satisfactory extinguishers were available during the cargo transfer operation as required in the tank barge's Certificate of Inspection. See also 46 CFR 34.50-10. The record fully supports the findings of the Administrative Law Judge.

III

Appellant argues the penalty assessed by the Administrative Law Judge is too severe and without proper consideration of the mitigating circumstances.

It is well settled that the sanction imposed at the conclusion of a case is exclusively within the authority and discretion of the Administrative Law Judge unless there is a showing that an order is obviously excessive or an abuse of discretion. Appeal Decisions 2391 (STUMES), 2362 (ARNOLD) and 2313 (STAPLES); see also Appeal Decision 2173 (PIERCE). There was no such showing here.

The Administrative Law Judge ordered a suspension of Appellant's document for one month outright plus an additional two months' suspension on ten months' probation upon finding proved the charge of misconduct. In view of the charges found proved, the sanction imposed is not unduly harsh or unwarranted and is hereby affirmed on appeal.

CONCLUSION

There was substantial evidence of a reliable and probative character to support the findings of the Administrative Law Judge with respect to the charge and specifications of misconduct and to the charge and specification of inattention to duty. The hearing was conducted in accordance with the requirements of applicable regulations. The order is appropriate.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas on 28 February 1985 is AFFIRMED.

J.C. IRWIN
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 21st day of August , 1986.

***** END OF DECISION NO. 2431 *****